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13 in its capacity as Indenture Trustee

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN JOSE DIVISION  
17

18 FINISAR CORPORATION, a Delaware  
19 corporation,

20 Plaintiff,

21 v.

22 U.S. BANK TRUST NATIONAL  
23 ASSOCIATION, a national banking association,  
24 not in its individual capacity, but solely in its  
25 capacity as Indenture Trustee on behalf of all  
26 Holders of Finisar Corporation's 5¼%  
27 Convertible Subordinated Notes due 2008, 2½%  
28 Convertible Senior Subordinated Notes due 2010,  
and 2½% Convertible Subordinated Notes due  
2010, and DOES 1 through 10, inclusive,

Defendants.

Case No. C 07-4052 JF (PVT)

**U.S. BANK'S NATIONAL  
ASSOCIATION'S RESPONSE TO  
PLAINTIFF FINISAR  
CORPORATION'S MOTION TO  
(1) DISMISS, (2) STRIKE, AND  
(3) ADJUDICATE U.S. BANK TRUST  
NATIONAL ASSOCIATION'S  
COUNTERCLAIMS**

Date: July 11, 2008  
Time: 9:00 a.m.  
Judge: The Hon. Jeremy Fogel  
Location: Courtroom 3



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**STATEMENT OF THE ISSUES**

1  
2           1.       Is U.S. Bank barred from raising counterclaims in response to Finisar's Amended  
3 Complaint, (a) where the California Code of Civil Procedure provides that no counterclaims are  
4 compulsory in response to actions seeking only declaratory relief, (b) where the counterclaims  
5 were authorized both by Fed. R. Civ. P. 15 and the terms of U.S. Bank's consent to amendment,  
6 and (c) where the counterclaim for fees and expenses was not mature at the time of the original  
7 answers?

8           2.       Do the Indentures authorize U.S. Bank to pursue a breach of contract claim on  
9 behalf of the Noteholders as a result of Finisar's failure to file its quarterly and annual reports in a  
10 timely manner with the SEC?

**PRELIMINARY STATEMENT**

11  
12           Earlier this year, Finisar Corporation ("Finisar") sought and received U.S. Bank Trust  
13 National Association's ("U.S. Bank") consent to file its Amended Complaint, which expanded the  
14 scope of its existing claims and brought new claims for the first time challenging U.S. Bank's  
15 contractual right to reimbursement of its fees and expenses. In response (as permitted by all  
16 applicable procedural rules and the specific terms of its consent) U.S. Bank answered the  
17 Amended Complaint and counterclaimed for breach of contract due to Finisar's breach of the  
18 Indentures and for fees and expenses under the Indentures.

19           Despite having amended and broadened its own claims, Finisar now argues that U.S. Bank  
20 had no right to respond in kind. But no authority requires U.S. Bank to raise, or otherwise lose,  
21 counterclaims in its answers to Finisar's original state court complaints that sought only  
22 declaratory relief. Regardless, Finisar's decision to amend its complaint opened the door to new  
23 counterclaims that had never been raised before. Indeed, at least one counterclaim was not even  
24 mature at the time U.S. Bank first answered. Contrary to Finisar's suggestion, U.S. Bank is  
25 authorized and duty-bound to pursue the breach of contract claims, with the issue of damages to  
26 be resolved beyond the pleading stage. Finisar's motion to dismiss, to strike, and to adjudicate  
27 counterclaims should be denied.  
28



## BACKGROUND

From October 2001 through October 2006, Finisar issued three series of debt securities in the form of subordinated notes (the “Notes”) under three Indentures, in the aggregate principal amount of \$250.25 million as of the date Finisar commenced this action. U.S. Bank acts as indenture trustee under the Indentures for the holders of the Notes (the “Noteholders”). As indenture trustee, U.S. Bank is contractually obligated under the Indentures to represent the Noteholders’ common interests.

On December 8, 2006, Finisar announced that it would be late in filing its quarterly report for its second fiscal quarter, ending October 29, 2006 (“Q2 Form 10-Q”), and disclosed that it was investigating its stock-option granting practices. Finisar then failed to file in a timely manner (1) a quarterly report for its third fiscal quarter ended January 28, 2007 (“Q3 Form 1-Q”), (2) an annual report for its fiscal year ended April 30, 2007 (“Form 10-K”), and (3) a quarterly report for its first fiscal quarter ended July 29, 2007 (“1Q Form 10-Q”, collectively with the Q2 Form 10-Q, Q3 Form 10-Q, and Form 10-K, the “SEC Filings”). Twelve months later, on December 4, 2007, Finisar filed its SEC Filings, which were between 3 and 12 months late. In the SEC Filings, Finisar alerted investors that they should not rely on any filings or other earnings statements made by Finisar before November 28, 2006.

On March 2, 2007, Finisar filed its first Complaint for Declaratory Relief in the Superior Court for the County of Santa Clara, California (“State Court”). Finisar’s complaint contained one cause of action for declaratory relief against U.S. Bank, seeking a determination that it was not in default for its delay in filing its Q2 Form 10 Q. U.S. Bank filed its Answer on April 13, 2007, before removing the action to this Court. The action was later remanded to the State Court (“State Action”).

After failing to file its Q3 Form 10-Q in a timely manner, Finisar filed its second Complaint for Declaratory Relief in the State Court on June 22, 2007. Again Finisar’s complaint contained one cause of action for declaratory relief against U.S. Bank, this time seeking a broader determination that it was not in default for its delay in filing its Q3 Form 10-Q and any other



1 filing with the SEC. U.S. Bank filed its Answer in the State Court on August 6, 2007, and  
2 removed the action to this Court (“Federal Action”).

3 On July 2, 2007, and December 17, 2007, U.S. Bank remitted invoices to Finisar for  
4 payment of its fees and expenses relating to the Events of Default and related litigation  
5 commenced by Finisar. (Mot. Summ. Judg. at 7-8; Ex. 30 to Declaration of Diana L. Jacobs in  
6 Support of Mot. Summ. Judg. (“Jacobs Decl.”).) Before the Events of Default, Finisar paid all of  
7 U.S. Bank’s fees and expenses. (Jacobs Decl. ¶ 22.) To prevent an additional Event of Default as  
8 a result of any failure to pay, on February 20, 2008, Finisar paid U.S. Bank’s fees and expenses  
9 through November 30, 2007 under “protest” and asserted that it was entitled to recover the  
10 amounts paid. (Am. Compl. ¶¶ 53, 55.)

11 In March 2008, Finisar sought U.S. Bank’s consent to amend its complaint in the Federal  
12 Action to incorporate its additional cause of action for recovery of amounts paid to U.S. Bank.  
13 Initially, Finisar proposed that U.S. Bank disavow any right to bring counterclaims in its Consent.  
14 U.S. Bank refused, and Finisar ultimately agreed to the consent that U.S. Bank filed with the  
15 Court on March 19, 2008 (“Consent”), which provided:

- 16 1. Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, [U.S. Bank]  
17 consents to the filing by Finisar of an Amended Complaint . . .; and
- 18 2. [U.S. Bank] shall respond to the Amended Complaint within thirty (30) days of the  
19 filing thereof.

20 Finisar filed the Amended Complaint on March 19, 2008 (“Amended Complaint”). The  
21 Amended Complaint substantially modifies Finisar’s recitation of the facts. In the Amended  
22 Complaint, Finisar expands the scope of its original cause of action (which sought relief for  
23 Finisar’s delay in filing the Q3 Form 10-Q and other SEC filings) by requesting a declaration that  
24 it was not in default for its delay in filing its Q2 Form 10-Q. (Before the amendment, Finisar’s  
25 requested relief regarding the delay in filing the Q2 Form 10-Q was only raised in the State  
26 Action.) Finally, Finisar asserts a new cause of action to recover the amounts paid to U.S. Bank  
27 for fees and expenses.

28 Pursuant to the Consent, U.S. Bank answered and counterclaimed on April 18, 2008  
29 (“Amended Answer”). U.S. Bank asserted two counterclaims: (1) for breach of contract due to



1 Finisar's failure to file the required documents with the SEC and U.S. Bank, and (2) for the fees  
 2 and expenses incurred by U.S. Bank in acting as indenture trustee under the Indentures.  
 3 (Counterclaims ¶¶ 23-31.)

4 Finisar now argues that U.S. Bank lost its right to counterclaim, and that the counterclaims  
 5 do not state a claim. Finisar is wrong on both counts, for the reasons that follow.

## 6 ARGUMENT

### 7 I. U.S. BANK'S COUNTERCLAIMS WERE TIMELY AND PROPER.

#### 8 A. California's Compulsory Cross-Claim Rule Does Not Apply to Finisar's 9 Declaratory Judgment Actions.

10 No rule requires U.S. Bank to assert, or otherwise lose, counterclaims in response to  
 11 Finisar's original complaints seeking only declaratory relief. Because each of Finisar's original  
 12 complaints filed in the State Court sought only declaratory relief pursuant to California Code of  
 13 Civil Procedure section 1060, no counterclaim was compulsory. (First Compl. ¶ 31; Second  
 14 Compl. ¶ 36.)

15 Finisar cites California Code of Civil Procedure section 426.30(a) for the proposition that  
 16 counterclaims not raised at the outset are waived. But California Code of Civil Procedure section  
 17 426.60 provides that counterclaims that are not raised are not waived "where the only relief  
 18 sought is a declaration of the rights and duties of the respective parties in an action for declaratory  
 19 relief under Chapter 8 (commencing with Section 1060) . . . ." Cal. Code Civ. P. § 426.60(c); *see*  
 20 *also Indus. Indem. Co. v. Mazon*, 158 Cal. App. 3d 862, 866 (1984) (denying motion to dismiss  
 21 counterclaims and holding that section 426.30 does not apply where plaintiff sought only  
 22 declaratory relief); *Russo v. Scrambler Motorcycles*, 56 Cal. App. 3d 112, 117 (1976) (same).

23 In short, where the plaintiff seeks only declaratory relief, no counterclaim is compulsory  
 24 under California rules. Because both original complaints sought only declaratory relief, Section  
 25 426.30 did not require U.S. Bank to raise its counterclaims at risk of otherwise losing them. For  
 26 this independent reason, Finisar's motion to dismiss fails.



**B. U.S. Bank Can Raise Counterclaims in Its Amended Answer Because Finisar's Amended Complaint Superseded Its Original Complaint and Expanded the Scope of the Action.**

**1. Finisar's Amendment Under Rule 15 Replaces the Second Complaint and U.S. Bank Can Respond Anew.**

Even if California Code of Civil Procedure Section 426.60 did not give U.S. Bank the right to hold its counterclaims when responding to a complaint for declaratory relief, U.S. Bank would have the right to assert its counterclaims in response to the Amended Complaint. The Amended Complaint superseded the original complaint in the Federal Action and receives *nunc pro tunc* treatment from June 22, 2007. *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (rejecting contention that amended complaint did not supersede the original complaint). Accordingly, U.S. Bank was entitled to respond anew, including bringing counterclaims for the first time. "Since the amending pleader chooses to redo his original work, and receives the benefit of this *nunc pro tunc* treatment, he can hardly be heard to complain that claims filed against him are improper because they should have been asserted in response to his original pleading." *Joseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc.*, 50 F.R.D. 415, 419 (D. Del. 1970) (permitting plaintiff's counterclaims to defendant's amended answer with counterclaims).

Where Finisar undertook to re-do its pleadings, U.S. Bank was free to respond in kind. *Refuse Fuels, Inc. v. Nat'l Union Fire Ins. Co.*, 139 F.R.D. 576, 578 (D. Mass. 1991) ("If plaintiffs' motion for leave to amend . . . was made pursuant to Rule 15(a) . . . the defendants did not need leave to serve new counterclaims and to assert new defenses"). "Rule 15(a) of the Federal Rules of Civil Procedure allows a party to plead in response to an amended complaint in accordance with the deadlines imposed by the court and Rule 13 refers to both compulsory and permissive counterclaims as pleadings." *Moellers N. Am., Inc. v. MSK Covertech, Inc.*, 912 F. Supp. 269, 272-73 (W.D. Mich. 1995) (counterclaims included in response directed by the court were authorized by the Federal Rules of Civil Procedure). Indeed, here the Consent agreed to by Finisar and filed by U.S. Bank expressly stated that U.S. Bank would "respond" within 30 days—without in any way limiting the content, nature, or format of the response. *Id.*



1                   **2.     Finisar’s Expansion of the Causes of Action in the Federal Action**  
 2                   **Through Its Amended Complaint Entitles U.S. Bank to Bring Its**  
 3                   **Counterclaims.**

4           As the courts and Federal Rules recognize, Finisar cannot expand the scope of the Federal  
 5   Action through its Amended Complaint, yet refuse to allow U.S. Bank to include counterclaims in  
 6   its response. In the Amended Complaint, Finisar seeks relief for all of its late filings when it  
 7   asserts that it is “entitled to a judicial declaration . . . that it did not default under Section 4.02 of  
 8   the Indentures by reason of any delay in making its SEC Filings.” This includes its Q2 Form 10-  
 9   Q, Q3 Form 10-Q, and Form 10-K. (Am. Compl. at ¶ 62; see also Am. Compl. at ¶ 34.) The  
 10   original complaint, however, was limited to its delay in filing its Q3 Form 10-Q and other filings  
 11   with the SEC.<sup>1</sup> (Second Compl. ¶ 36.)

12           Realizing that the State Action has been all but suspended pending determination by this  
 13   Court, Finisar used the opportunity to amend its complaint in the Federal Court to merge both  
 14   actions. The Amended Complaint specifically incorporates the cause of action arising out of the  
 15   first Event of Default—Finisar’s failure to file the Q2 Form 10-Q—which previously had been  
 16   addressed only in the complaint still pending in State Court. Particularly where Finisar expanded  
 17   this action to encompass the first late SEC filing, Finisar cannot bar U.S. Bank from adding  
 18   counterclaims that address the same occurrence. *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp.  
 19   812, 832 (N.D. Iowa 1997) (new counterclaims permitted without leave of court when amended  
 20   complaint expanded scope of plaintiff’s claims).

21                   **C.     U.S. Bank Could Not Bring the Claim for Fees and Expenses Earlier Than Its**  
 22                   **Counterclaim.**

23           Even if the state and federal statutes, rules, and holdings described above somehow were  
 24   disregarded, U.S. Bank’s counterclaim for fees and expenses was timely. This counterclaim was  
 25   not compulsory when U.S. Bank answered the original complaints because it was not yet mature.  
 26   Rule 13(a)(1) states, in part, that “[a] pleading must state as a counterclaim any claim that—at the

27                   <sup>1</sup> An interpretation that these “other filings” might include the Q2 Form 10-Q is illogical  
 28                   because it would render the State Action duplicative.



1 *time of its service*— the pleader has against an opposing party . . . .” Fed. R. Civ. P. 13 (emphasis  
 2 supplied). “A counterclaim that has not matured at the time the pleader serves his pleading is not  
 3 compulsory, even if it arises out of the same transaction as does the plaintiff’s claim.” *Young v.*  
 4 *City of New Orleans*, 751 F.2d 794, 801 (5th Cir. 1985) (citing 6 C. Wright & A. Miller, Federal  
 5 Practice and Procedure § 1411 at 55 (1971)); *Stone v. Dep’t of Aviation*, 453 F.3d 1271, 1276  
 6 (10th Cir. 2006) (noting that under Colorado law, which is almost identical to Rule 13(a), claim  
 7 acquired after answer was filed is not a compulsory counterclaim, even if it arises out of the same  
 8 transaction).

9 Although Finisar’s contractual obligations under the Indentures to reimburse U.S. Bank  
 10 existed when Finisar served its complaints in March and June of 2007, U.S. Bank’s claims did not  
 11 arise at that time. U.S. Bank issued its invoices for fees and expenses later in July and again in  
 12 December of 2007. When U.S. Bank answered, Finisar had not yet triggered or threatened an  
 13 Event of Default with respect to its obligation to pay the invoices. On February 20, 2008, by  
 14 paying the outstanding invoices through November 30, 2007, Finisar avoided an Event of Default  
 15 and potentially obviated the need for any counterclaim. But in protesting any future payments,  
 16 and seeking return of amounts paid in its Amended Complaint, Finisar created an actual  
 17 controversy giving rise to U.S. Bank’s counterclaim.

## 18 **II. THE INDENTURES AUTHORIZE U.S. BANK TO PURSUE CLAIMS FOR** 19 **BREACH OF THE INDENTURES.**

20 Finisar willfully mischaracterizes U.S. Bank’s counterclaim in its motion, which is  
 21 inappropriate under Fed R. Civ. P. Rule 12. The scope and application of Rule 12 are quite  
 22 limited and do not apply in this situation.<sup>2</sup> U.S. Bank properly states a claim for relief in the first  
 23 count of its counterclaim.

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24 <sup>2</sup> See, e.g., *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991) (“motions  
 25 to strike should not be granted unless it is clear that the matter to be stricken could have no  
 26 possible bearing on the subject matter of the litigation”); *Smith v. Simmons*, 2008 WL 744709,  
 27 No. 1:05-CV-01187-OWW-GSA, at \*4 (E.D. Cal. Mar. 18. 2008) (“motions to dismiss under  
 28 Fed. R. Civ. P. 12(b)(6) are disfavored and rarely granted.” (citation omitted)); *McGlinchy v.*  
*Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988) (“A dismissal on the pleadings [under Rule  
 12(c)] for failure to state a claim is proper only if ‘the movant clearly establishes that no material

(Footnote continues on next page.)



1 Finisar's misguided argument based on the fact that U.S. Bank's first counterclaim  
 2 demands "unspecified damages" is a red herring. In fact, U.S. Bank's first counterclaim properly  
 3 requests a judicial determination that Finisar breached the SEC reporting covenants of the  
 4 Indentures and that the related Events of Default are continuing. (Counterclaims ¶¶ 25-26.) U.S.  
 5 Bank seeks this judicial determination of Finisar's continuing default in Count I of the  
 6 Counterclaim because it is seeking to establish the basis for remedies under the Indentures. U.S.  
 7 Bank is fully authorized under the Indentures to act on behalf of the Noteholders, including acting  
 8 to accelerate notes, to collect principal and interest, and to collect its costs and fees, which it  
 9 seeks in Count I. (Indentures §§ 6.02, 6.03, 7.06.) Finisar's argument that principal and interest  
 10 are not due now overlooks the fact that an acceleration can be declared if the Court finds there is a  
 11 continuing default, as U.S. Bank requests in Count I. This is precisely why U.S. Bank asserted  
 12 this count in the Counterclaim.

13 U.S. Bank is not seeking in Count I to enforce claims for any damages that are unique to  
 14 an individual Noteholder (e.g., any loss in value of their investment during the period Finisar  
 15 failed to file its SEC Filings). A determination of Finisar's default under Count I, however, is  
 16 necessary to determine how Noteholders may proceed if they were uniquely damaged. U.S. Bank  
 17 is not taking this individual action in Count I.

18 Because U.S. Bank has plainly stated a claim for breach of the Indentures, Finisar's  
 19 motion to dismiss, strike, or adjudicate U.S. Bank's first counterclaim should be denied.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

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26 (Footnote continued from previous page.)

27 issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.'" (quotation omitted)).



**CONCLUSION**

For all of the foregoing reasons, Finisar's motion to dismiss, strike or adjudicate U.S. Bank's counterclaims should be denied.

Dated: June 20, 2008

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